

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-7160

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7160

SALINAS LETTUCE FARMERS COOPERATIVE,

Appellant,

v.

SALT CITY PRODUCE CO., INC.,

Appellee.

APPENDIX



Appeal for the United States District Court
for the Northern District of New York

Dickson R. Loos
Edgar T. Bellinger
Pope Ballard & Loos
700 Brawner Building
888 Seventeenth Street, NW.,
Washington, D. C. 20006

Attorneys for Appellant

✓

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SALINAS LETTUCE FARMERS COOPERATIVE v. SALT CITY PRODUCE CO., INC.

1971

Nov. 18 Filed Petition of Plaintiff on appeal and notice of appeal pursuant to T 7, U.S.C. 499a, et seq. and Sec. 499 (c)

Nov. 18 Filed Bond on Appeal

1972

Jan. 28 Filed Certified copies of complaint, answer, Decision and Order, Extension of Time Stay Order, Petition for Reconsideration, and Order on Reconsideration

1973

Dec. 24 Filed Plaintiff's Note of Issue - March 1974 - Albany - Court

1974

Jan. 10 Off Dismissal Calendar

May 28 Filed Notice of Motion returnable June 17, 1974 at Albany, Motion for summary judgment affidavit in support of motion for summary judgment

May 28 Filed Plaintiff's Memorandum of Law

June 17 Motion for summary judgment-adjourned to June 24, 1974 at Utica

June 24 Motion for summary judgment, Judge to dispose of this

Dec. 27 Filed Order (12/26/74) denying motion for summary judgment, and directing judgment enter in favor of defendants, affirming decision and order to Sec. of Agriculture and decision of Sec. of Agriculture is affirmed

Dec. 27 Filed Judgment - HON. E. PORT, USDJ

Dec. 27 Mailed cards re judgment to Slavin & Hersch, Att. Gilbert M. Hersch, and Thomas F. Pasqua

1975

Jan. 27 Filed Notice of Appeal

A Salinas Lettuce Farmers Cooperative
SALINAS, PACKERS, SHIPPERS — CALIFORNIA VEGETABLES
MAIL OFFICE, POST OFFICE BOX 594 • SALINAS, CALIFORNIA 93901

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE

P. A. C. A. DOCKET NO. _____

SALINAS LETTUCE FARMERS COOPERATIVE
SALINAS, CALIFORNIA

Vs
SALT CITY PRODUCE COMPANY, INC.
SYRACUSE, NEW YORK

COMPLAINANT ABOVE-NAMED RESPECTIVELY ALLEGES

1. That complainant is a corporation, whose post office address is P.O. Box 594, Salinas, California 93901
2. That complainant is informed and believes that respondent is a corporation whose post office address is P.O. Box 1095, Syracuse, New York.
3. That respondent, at the time of the transaction involved herein, was licensed, or was subject to license, under the Perishable Agricultural Commodities Act of 1930, as a dealer, commission merchant.
4. That on or about the 6th day of May, 1970, in the course of interstate commerce, complainant by oral contract, sold to the respondent, 1200 cartons two (2) dozen iceberg lettuce, being a perishable agricultural commodity at the agreed price of \$3.50 F.O.B. plus .25¢ vacuum cooling per carton, shipping point, U.S. #1, protecting shippers market decline, if any, through May 8th, 1970. The F.O.B. price was adjusted to \$2.25 F.O.B. plus .25¢ vacuum cooling, in line with the contract terms. Shipment to be made May 6, 1970 from Salinas, California, routed SP UP RI PCN to Syracuse, New York. EXHIBIT NO. 1.
5. That said commodity was inspected at point of shipment on or about the 6th day of May, 1970, the report of which inspection is set forth in USDA Inspection Certificate #A 143364 attached hereto as EXHIBIT NO. 2.
6. That said contract was negotiated by Richard Pusatoro, agent of J. F. MacNulty Inc., Syracuse, New York, a broker who acted in negotiating such sale as agent for both complainant and respondent. EXHIBIT NO. 3.
7. That complainant shipped on May 6, 1970 from Salinas, California, in interstate commerce to respondent at Syracuse, New York, the kind, quality, grade and size of commodity called for in said contract of sale and in the manner agreed upon in car PFE 457688. EXHIBIT NO. 4.
8. That upon arrival of said iceberg lettuce at destination, respondent accepted the commodity in compliance with said contract of sale but has since failed, neglected and refused to pay complainant the agreed purchase price thereof, in the amount of \$3,000.00.

Salinas Lettuce Farmers Cooperative
CULTIVATORS, PACKERS, SHIPPERS — CALIFORNIA VEGETABLES

MAIN OFFICE - POST OFFICE BOX 593 • SALINAS, CALIFORNIA 93901

PAGE TWO

That shipment was ordered on May 5, 1970 - considering normal running time was due to arrive the seventh morning, May 13, 1970 to be exact. PFE 457688 was available and inspected at 8:40 a.m. Friday, May 15, 1970. That destination inspection #A 63858 made May 15, 1970 at Syracuse found the shipment to meet the terms of the contract. EXHIBIT NO. 5.

That follow-up inspection #A 63893 was made at Syracuse, New York at 10:00 a.m. Monday, May 18, 1970. In an effort to determine the nature of the product disorder noted in this inspection, samples of the product were sent to the USDA plant pathologist for examination, which disorder was determined to be brown stain, a disorder associated with relatively high carbon dioxide levels in transit. USDA Marketing Research Report No. 863, attached hereto as EXHIBIT NO. 6 & 6A.

That shipping point inspection #A 143364, EXHIBIT NO. 2 shows the product to be 6% hard; 83% firm; 10% fairly firm.

That destination inspection #A 63858 shows the product solidity to be 81% hard or firm; 17% fairly firm. EXHIBIT NO. 5.

That destination inspection #A 62849, EXHIBIT NO. 7 made of late car in Bronx, New York shows solidity to be 88% hard or firm; 12% fairly firm.

CONCLUSIONS:

That all USDA inspections, shipping point and destination, show this lettuce to have a high degree of fairly firmness, an indication of optimum maturity, a condition recommended by the USDA for the maintenance of quality and condition. University of California Research Bulletin - EXHIBIT NO. 8.

That a copy of the vacuum cooling chart attached hereto as EXHIBIT NO. 9 attests to the proper shipping point cooling procedures.

That high carbon dioxide levels in transit were responsible for the condition found in the re-inspection of PFE 457688. EXHIBIT NO. 6 - 6A - 6B.

That in an F.O.B. purchase, the intransit risk are the responsibility of the purchaser.

That the complainant made a good delivery according to the terms of the contract, verified by USDA inspection #A 63858 and the invoice amount of \$3,000.00 is due and payable.

9. That the matters and actions set forth herein constitute a violation by respondent of Section 2 of the Perishable Agricultural Commodities Act of 1930.

Salinas Lettuce Farmers Cooperative
GROWERS, PACKERS, SHIPPERS — CALIFORNIA VEGETABLES

MATH OFFICE, POST OFFICE BOX 594 • SALINAS, CALIFORNIA 93901

PAGE THREE

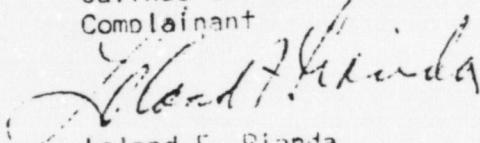
10. Respondent has paid complainant only \$2,350.00 leaving a balance due of \$650.00.

11. Complainant's exhibits, numbered 1 to 9 inclusive, are original or true copies of original papers relating to the matters involved herein and are attached hereto as part of this complaint.

WHEREFORE complainant prays that a copy of this complaint be served upon the above named respondent and that he be required to answer the charges herein stated in writing within such time as the Secretary may require; that, upon the record made, either with or without formal hearing, as provided in the Act or in the regulations, and by appropriate order, the complainant be awarded such amount of damages as it may be entitled to receive according to the facts established and that the Secretary also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated Tuesday, this 3rd day of November, 1970.

Salinas Lettuce Farmers Cooperative
Complainant

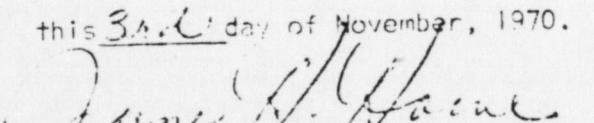


Leland F. Rianda
Executive Vice-President
General Manager

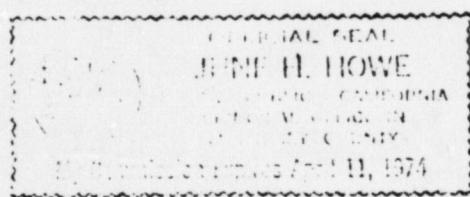
LFR/jh

Subscribed and sworn to before me

this 3rd day of November, 1970.



Notary Public in and for the County
of Monterey, State of California.



UNITED STATES DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA DEPARTMENT OF AGRICULTURE

689 A143364

INSPECTION CERTIFICATE

FEE \$ 36.00

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and the Statutes of the State of California, and is admissible as *prima facie* evidence in all courts of the United States and of California. **WARNING:** Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

INSPECTION POINT	Salinas, Calif.		TYPE OF CONVEYANCE	CONVEYANCE NUMBER	
INSPECTION BEGUN (HOUR, DATE)			Milk Refrig	PFE 457688	
10:30 AM DS May 6 1970			INSPECTION COMPLETED (HOUR, DATE)		
NAME OF APPLICANT			2:30 pm DS May 6 1970		
Salinas Lettuce Farmers Coop			ADDRESS OF APPLICANT		
I OF SHIPPER			ADDRESS OF SHIPPER	Salinas, Calif	
PRODUCT	LOADER'S COUNT	CONTAINERS		DECAY	GRADE
		TYPE	MARKINGS		
Head Lettuce	1200	Cartons	Downtown	none	U.S.N.O.1, 89% Hard and firm
Averages:	6%	hard, 83% firm, 10% fairly firm Defects within tolerance, including 1% soft.			
Meets Canadian Import Requirements					

I made personal inspection of samples believed by me to be representative of the lot described and that the quality and/or condition, at the time and date shown above, pertaining as shown by said samples, were as stated herein.

H.P. Werner

INSPECTOR

PLEASE REFER TO THIS CERTIFICATE BY NUMBER

J. F. MAC NULTY, INC.

Albany Office
HANAS REGIONAL MARKET
 Phone 434-3144

Hartford Branch
CONN. REGIONAL MARKET
 Phone 522-1079



Syracuse Branch
Syracuse Regional Market
 Phone 474-1294

Buffalo Branch
176 Niagara Food Terminal
 Phone 822-0300

Fruit & Vegetable Broker STANDARD MEMORANDUM OF SALE

No.

5/6/70

Date Confirmed

5/6/70

Unless otherwise stated herein, it is understood
 that this sale is made in contemplation of and
 subject to trade terms and definitions of the
 Perishable Agricultural Commodities Act.

Date Ordered

When the terms of sale have been agreed upon the broker shall fill out this Standard Memorandum of Sale in triplicate, sending one copy to the seller, one to the buyer and retaining the third copy for his own file. Unless the seller or the buyer makes immediate objection upon receipt of his copy of this Standard Memorandum of Sale, showing that contract was made contrary to authority given the Broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated.

SYRACUSE, N.Y.

Date

5/6/70

19

City

SALT CITY PRODUCE CO.

(Buyer)

SYRACUSE, N.Y.

(P. O. Address)

Sold to

BUYER

SYRACUSE, N.Y.

Destination

Ship to

SAME

Advise

PCN

Positive Routing

SP UP RI PCN

Railroad Delivery Preferred

SALINAS LETTUCE FARMERS COOP.

SALINAS, CALIF.

Sold for account of

Seller

(P. O. Address)

CALIFORNIA

Shipment from

(Shipping Station or District)

Time of shipment

TODAY

Rolling Car

XXXX

(If car is sold while rolling—date of shipment and approximate location when possible, also routing.)

LATER

Car No. and Initial

USUAL WAY

How Shipped or to be Shipped
 (Iced, Ventilated, Standard Ventilation, Shippers Protective Service, or Carriers Protective Service.)

Style of Equipment—Refrigerator Car

Box Car

Ventilated Car

Stock Car

(Style of equipment to be designated by check or cross.)

F.O.B. SHIPPING POINT

Sale made (F.O.B. or Delivered)

INVOICE

Terms, How Payable

NONE

Special Agreement, if any

QUANTITY

COMMODITY AND SPECIFICATIONS

PRICE

ONE CARLOAD "RENTICIDE BRAND UNION CALIFORNIA ICEBERG" LETTUCE AT
 CEILING PRICE OF \$3.50 F.O.B. SHIPPING POINT.

1200/240

Shipper will protect decline, if any, in his market through Friday 5/8
 shipper advises weight to be 49 to 51 pounds before cooling.

EXHIBIT # 3

OAH FY 195
17-1-65
COPYUNITED STATES DEPARTMENT OF AGRICULTURE CALIFORNIA
ON FIBER AND MARKETING SERVICE A-63858
INSPECTION CERTIFICATE A-63858

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and is admissible as prime fact evidence in all courts of the United States.

WARNING: Any person who knowingly shall falsely make, issue, alter, forge, or counterfeite this certificate, or participate in any of such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

Market Syracuse, N.Y. Date May 13, 1970 Hour 8:40 A.M. ESTTo Salt City Produce Co. Address Regional Market, Syracuse, N.Y. 13203
(Applicant)Shipper Salinas Lettuce Farmers Cooperative Address P.O. Box 304, Salinas, California 93901Receiver Salt City Produce Co. Address Regional Market, Syracuse, N.Y. 13203

I certify that in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected at the time and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said time and on said date were as stated below:

Car No. W Mechanical Mechanical Where Tuna Track, Regional
Truck License PER 457000 Kind Refrigerator Inspected Market Syracuse, N.Y.

Condition of equipment Refrigeration motor running. An adjustable load divider in position approximately 7 feet from each side of door.

Products inspected L.E.T.T.U.C.E., Iceberg type in cardboard cartons branded "D'WHITE BRAND,
2 D.L. LETTUCE, GROWN AND SHIPPED BY SALINAS LETTUCE FARMERS COOPERATIVE,
SALINAS, CALIFORNIA."

Condition of loads Applicant's count - 1200 cartons.
Thru load. Between dividers 2 to 6 rows, 7 and 8 layers, lengthwise and crosswise loading.

Condition of packs Fight in layers.Temperature of products At doorway: Top 36°F., bottom 39°F.Size Fairly uniform.

Quality Clean, generally fairly well trimmed, head leaves good green color. Average 81% hard or firm, 17% fairly firm. Grade defects average 4% including 2% soft, remainder poorly trimmed.

Conditions Heads or portion of heads not affected by condition defects are fresh and crisp.

SPRING LEAVES: No decay.WINTER LEAVES: Average 1% damage by brown discoloration of midrib.
Average 1% decay.Grade U.S. No. 1 81% hard or firm.Remarks This inspection and certificate is restricted to the upper 3 layer cartons
between dividers.

EXHIBIT NO. 5

Fee 17.00

R.A. MURRAY

Expenses 17.00

Supervising Inspector

Total 17.00Address 100 Jefferson St., Rochester, New York 14623

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL RESEARCH SERVICE
MARKET QUALITY RESEARCH DIVISION
EASTERN MARKET PATHOLOGY INVESTIGATIONS
BELLE MEAD, NEW JERSEY 08802

May 21, 1970

Mr. Ralph A. Knaust
N. Y. State Department of
Agriculture & Markets
2100 Park Street
Syracuse, New York 13208

Dear Mr. Knaust:

The brown discoloration on the head leaves of the California head lettuce sample sent us is due to a disorder we call brown stain. While the cause has not been positively established, California researchers have found the disorder to be associated with relatively high carbon dioxide levels in transit.

Sincerely,

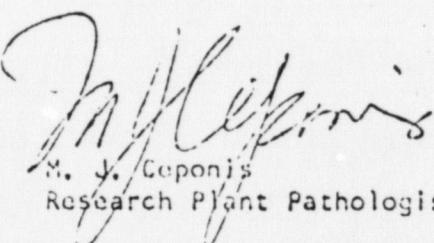

M. J. Deponis
Research Plant Pathologist

EXHIBIT # 6

are usually $\frac{1}{4}$ to $\frac{1}{2}$ inch in diameter but sometimes larger, particularly when they coalesce. The affected areas are generally on the outer surface of the head leaves, on or near the midrib, and usually extend toward the basal half of the leaf. When the disorder is severe, the inner leaf surface is often affected, also. The affected areas range from pale straw to brown, and margins are sometimes dark and mottled. We have named the disorder "brown stain."

Although the percentage of heads with brown stain was higher in the 12 MA than in the 12 NA vehicles, the difference was not statistically significant (table 5). The disorder does not appear to be related to low O₂ or high CO levels during transit, but is related to increased CO₂ levels (table 6). The data in table 6 were arranged to readily illustrate this relationship. Lettuce in vehicles that had 1.9 percent or less CO₂ at arrival was free of this disorder, but lettuce in vehicles with 2.4 percent or more CO₂ was not. The CO₂ measured at destination probably does not represent the highest CO₂ concentration that occurred in transit. Barger and others³ conducted transcontinental shipping tests with asparagus loaded in a 50-foot conventional railcar, mechanically refrigerated, and found that CO₂ levels increased from 2.6 percent in California to a maximum of 5.8 percent in Wyoming, then decreased to 2.9 percent in New Jersey.

Brown stain occurred in lettuce shipped in both the MA and NA vehicles. However, since more MA vehicles than NA vehicles had CO₂ levels above 2 percent at destination, more lettuce shipped in MA vehicles had the disorder than lettuce shipped in NA vehicles. There does not appear to be a correlation between the incidence of the disorder and increasing concentration of CO₂ from 2.4 to 5.8 percent, although detailed laboratory tests will be required to determine whether a correlation exists. Brown stain did not increase significantly during holding for 4 days at 50° F.

Tip burn was not influenced significantly by the transit atmosphere (table 5).

Russet spotting occurred to a very limited extent only in three paired test shipments and only 16 heads out of 864 examined had sufficient russet spotting to be objectionable. Therefore, these data were not analyzed statistically. All of the heads with russet spotting occurred in the three cars with normal atmospheres; 1.4 percent of the heads were affected at arrival and 6.0 percent were affected after 4 days at 50° F.

Rib discoloration was so rare that data for this disorder were not analyzed. There appeared to be

no difference in the occurrence of rib discoloration in the MA and NA cars.

Weight loss from lettuce during transit averaged 0.4 percent in both the MA vehicles and the NA vehicles.

DISCUSSION

Modified or controlled atmospheres with low oxygen levels have been shown to reduce the occurrence of russet spotting of lettuce during transcontinental⁴ or simulated transcontinental shipments.⁵ Not all lettuce is predisposed to this disorder. Reduction of russet spotting was almost the only improvement in lettuce quality attributable to low-oxygen atmospheres in these previous tests. A subsequent series of shipping tests⁶ with modified-atmosphere rail equipment indicated that slightly less decay developed in lettuce shipped in low-oxygen vehicles⁷ than in normal-atmosphere vehicles. Also, butt discoloration at arrival was slightly less severe in the low-oxygen trailers. However, transit temperatures also averaged about 3° F. lower in the low-oxygen vehicles. Consequently, it is not clear whether the improvement in quality was due to the lower temperatures, the lower oxygen levels, or a combination of these two factors.

Although russet spotting was not prevalent enough in these tests to warrant statistical analyses, all lettuce affected with the disorder occurred in the NA vehicles, a finding which agrees with those of earlier tests. One can assume, therefore, that the modified atmosphere system reported here would be effective in reducing russet spotting of lettuce predisposed to this disorder.

In two of the paired vehicles pink rib was significantly reduced in the MA vehicles. No statistically significant reduction in pink rib from modified atmospheres has been observed previously. The effects of low-oxygen atmospheres on pink rib is not conclusive, therefore, and should be studied further.

Test findings link CO₂ levels above 2 percent at destination with a lettuce disorder not previously reported in commercial shipments. We call this disorder "brown stain." In an unpublished study conducted by J. K. Stewart and M. Uota at the USDA laboratory in Fresno, Calif., as a result of the discovery of brown stain in the shipping tests conducted for this study, brown-stain lesions were produced by high CO₂ levels similar to those observed in the shipping tests.

⁴ See footnote 1, p. 1.

⁵ Lipton, W. J. *Market Quality and Rate of Respiration of Head Lettuce Held in Low-Oxygen Atmospheres*. U.S. Dept. Agr. Market. Res. Rpt. 777, 9 pp., illus. 1967.

⁶ See footnote 2, p. 1.

³ Barger, W. R., Harvey, J. M., Stewart, J. K., Ceponis, M. J., and Lipton, W. J. *California Asparagus: Effect of Transit Environments on Market Quality*. U.S. Dept. Agr. Market. Res. Rpt. 428, 26 pp. 1960.

MARKET QUALITY RESEARCH DIVISION
Agricultural Research Service.
U.S. Department of Agriculture
Hyattsville, Md.

October 22, 1970

For A.M. Release, Nov. 2, 1970

Gains Reported in Efforts to Establish Causes of Lettuce Disease:

A disorder of lettuce occasionally observed in rail shipments, in which the leaves develop an unusual brown stain, has been duplicated in the laboratory by U.S. Department of Agriculture scientists seeking to pin down conditions causing the disease.

The discoloration, observed by market pathologists of USDA's Agricultural Research Service, has been attributed to physical changes in leaf tissue that are influenced by environmental conditions rather than bacterial or other disease agents. When the various transit and storage conditions that can induce the disorder are firmly established, scientists should then be able to develop effective control measures.

ARS horticulturist Joseph K. Stewart presented results of the lettuce experiments in a paper presented at the 67th annual meeting of the American Society for Horticultural Science, Miami Beach, Fla., today (Nov. 2). Mr. Stewart and ARS horticulturist Masami Uota obtained symptoms almost identical to the brown stain observed in rail shipments of lettuce by holding the heads in concentrations of carbon dioxide varying from 2½ to 10 percent, in experiments at the U.S. Horticultural Field Station, Fresno, Calif.

About 85 percent of the lettuce developed the disorder when the heads were held in an atmosphere containing 10 percent carbon dioxide. Severity of the disorder was almost correspondingly less as the concentration of carbon dioxide was reduced to 5 or 2½ percent, Mr. Stewart reported. Discoloration was not always immediately evident, he noted. Delayed effects became apparent when lettuce was taken from a carbon dioxide atmosphere after 7 days exposure at 35°F. Brown staining became more pronounced in a subsequent 4-day holding period at 50°F., in air, simulating wholesale or retail storage conditions.

Lettuce decay, or such disorders as pink rib and tipburn, were not affected by the experimental conditions under which the lettuce was held.

#

EXHIBIT 6B

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE

RECEIVED — PACA

DEC 24 1970

P.A.C.A. Docket No. _____

Salinas Lettuce Farmers Cooperative }
Complainant }

v.
Salt City Produce Co., Inc. }
Respondent }

ANSWER

DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.
File # _____
PACA J-8939

The above-named respondent, for answer to the complaint in this proceeding states :

1. That complainant is a corporation whose post office address is P.O. Box 594, Salinas, California 93901.
2. That the respondent is a corporation whose post office address is 2100 Park St., Syracuse, N.Y. 13208 and that the respondent has never had a P.O. Box Number at any time.
3. Contrary to complainant's allegation in paragraph 8 of complaint, respondent hereby states that subject car arrived at 2PM on Thursday May 14, 1970, on schedule, and following respondent's inspection, A Government Inspection was ordered but was not completed until the morning of Friday May 15th; and further the respondent never refused to pay complainant the agreed purchase price, as also alleged in paragraph 8, but acted and remitted on the advice of the broker, who, respondent believes, had been in communication with the complainant.
4. Contrary to complainant's allegation on Page 2 of complaint, the normal running time to the Syracuse Market from West Coast points is eighth morning.
5. Contrary to complainant's allegation on Page 2 of complaint, product was not in suitable shipping condition when shipped from California according to diagnosis by Prof. Sherf of Cornell University; see broker's letter to complainant dated June 23, 1970.
6. Contrary to complainant's allegation also Page 2 of complaint respondent believes and contends that good delivery was not made by complainant and that condition of product was not of the intrinsit risk nature, but rather that the product was unsuitable at the time of shipment by complainant

Dated _____ this 18 day of Dec 1970.

Salt City Produce Co., Inc.
Respondent
James Schim
Title President

State of New York }
County of Oswego } ss.

Donald W. Schiano, being first duly sworn, says that he has read the foregoing answer and knows that the same is true, except as to matters therein stated on information and belief, and as to such matters he believes to be true, and that he is duly authorized to sign the answer.

Subscribed and sworn to before me this 18 day of November 1970

Francis W. Neuser

FRANCIS W. NEUSER
Notary Public in the State of New York
Qualified in Onon. Co. No. 34-2873450
My Commission Expires March 30, 1971

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Salinas Lettuce Farmers)
Cooperative,) PACA Docket No. 2-1977
Complainant)
v.)
Salt City Produce Co., Inc.,) Decision and Order
Respondent)

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$650 in connection with a transaction in interstate commerce involving a carload of lettuce.

A copy of the report of investigation, together with a supplement thereto, was prepared by the Department and served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, in substance denying liability to complainant in connection with this transaction.

Since the amount requested as damages in the formal complaint does not exceed \$1,500, the shortened method of procedure provided in section 47.20 of the rules of practice (7 CFR 47.20) is applicable. Pursuant to this procedure, complainant filed an opening statement. Respondent was given the opportunity but did not file an answering statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Salinas Lettuce Farmers Cooperative, is a corporation whose address is P. O. Box 594, Salinas, California.

2. Respondent, Salt City Produce Co., Inc., is a corporation whose address is 2100 Park Street, Syracuse, New York. At the time of the transaction involved herein, respondent was licensed under the act.

3. On May 6, 1970, in the course of interstate commerce, complainant sold to respondent one carload, or 1200 cartons, of California Iceberg lettuce, 2-dozen size, "Downtown" brand, U.S. No. 1 grade, at an agreed price of \$3.50 per carton, f.o.b. shipping point, Salinas, California, plus 25¢ per carton vacuum cooling charge. It was further agreed between the parties that respondent would be protected on this transaction against market decline at shipping point through May 8, 1970.

4. The contract set forth above was negotiated between the parties by a broker, J. F. McNulty, Inc., which issued a Standard Memorandum of Sale on May 6, 1970, setting forth the terms of said contract.

5. On May 6, 1970, complainant shipped 1200 cartons of lettuce, 2-dozen size, "Downtown" brand, from Salinas, California, to respondent at Syracuse, New York, in a mechanically refrigerated car, PFE 457688. A joint Federal-State inspection had been made of the lettuce in car PFE 457688 on May 6 in Salinas, with the lot being certified as U.S. No. 1 grade, 89% hard and firm at that time.

6. Car PFE 457688 arrived at contract destination, Syracuse, New York, at 2 p.m. on Thursday, May 14, 1970. Respondent examined the lettuce in the car that afternoon and requested a Federal inspection. The Federal inspection, made at 9:40 a.m. the following day, May 15, yielded the following results in relevant part:

"Condition of equipment: Refrigeration motor running. An adjustable load divider in position approximately 7 feet from each side of door.

"Products inspected: LETTUCE ... 'Downtown Brand' ... Applicant's count - 1200 cartons.

"Condition of load: Through load. Between dividers 2 to 6 rows, 7 and 8 layers, lengthwise and crosswise loading.

"Temperature of product: At doorways: Top 38° F., bottom 39° F.

"Quality: Clean, generally fairly well trimmed, head leaves good green color. Average 81% hard or firm, 17% fairly firm. Grade defects average 4%, including 2% soft, remainder poorly trimmed.

"Condition: ... Wrapper leaves: No decay. Head leaves: Average 1% damage by brown discoloration of midribs. Average 1% decay.

"Grade: U.S. No. 1, 81% hard or firm.

"Remarks: This inspection and certificate is restricted to the upper 3 layer cartons between dividers."

7. On May 15, 1970, the broker prepared a "corrected invoice" addressed to respondent, reflecting a reduction in the f.c.b. contract price of \$1.25 per carton, in accordance with the protection agreement which was a part of the contract of May 6. The total f.o.b. contract price, as adjusted, plus cooling charges, amounted to \$3,000.

8. At 10 a.m. on Monday, May 18, 1970, a second Federal inspection was made of the lettuce then remaining in car FFE 475688 at Syracuse. The results of that inspection, in relevant part, are as follows:

"Condition of equipment: Refrigeration motor running. Adjustable load dividers in position approximately 7 feet from each side of door.

"Products inspected: LETTUCE ... 'Downtown Brand' ... Applicant's count - 700 cartons (See remarks).

"Condition of load: Car partly unloaded. Cartons removed from between dividers. Behind dividers 2 to 6 rows, 7 to 8 layers, lengthwise and crosswise loading.

"Temperature of product: 1st stack behind divider: Top, 37°F. Bottom, 37°F.

"Quality: Clean, generally fairly well trimmed, head leaves good green color. Average 81% hard or firm, 17% fairly firm. Grade defects average 3%, including 2% soft, remainder poorly trimmed.

"Condition: ... Wrapper leaves: No decay. Head leaves: Range from 5 to 14 heads per carton, average 37% damage and including 15% serious damage by a reddish-brown blotch type discoloration affecting various sections of leaves. Average 1% decay.

"Grade: Meets Quality Requirements but fails to grade U.S. No. 1, 81% hard or firm only account condition.

"Remarks: This inspection and certificate is restricted to the upper 4 layer cartons remaining in car behind load dividers."

9. Respondent complained to the broker and to complainant, respectively, in telegrams sent to each on May 20, 1970, as follows:

To the broker:

"PLEASE BE ADVISED THAT I INTEND TO HOLD YOU AND YOUR ORGANIZATION RESPONSIBLE FOR ANY LOSS INCURRED DUE TO YOUR FAILURE TO HANDLE PROMPTLY AND PROPERLY WITH THE SHIPPER PFL 475688."

To complainant:

"HOLDING YOU AND BROKER RESPONSIBLE FOR ANY LOSS INCURRED PFL 475688."

10. The total f.o.b. price of the lettuce involved herein, as adjusted, is \$3,000, of which respondent has paid complainant \$2,350.

11. The formal complaint was filed on November 16, 1970, which was within 9 months after the alleged cause of action herein accrued.

Conclusion

Respondent's acceptance of the lettuce involved herein is not disputed. Accordingly, respondent is liable to complainant for the agreed contract price thereof, less provable damages sustained by respondent as the result of any breach of contract by complainant, and less any payment made by respondent to complainant in connection with this transaction. B. G. Anderson Co., Inc. v. Comunale, 25 A.D. 228.

Respondent, in substance, takes the position that the warranty of suitable shipping condition was breached by complainant, in that the lettuce shipped by complainant failed to conform to the good delivery standards for lettuce set forth in Section 46.44 of the regulations (7 CFR 46.44). 1/

1/ The good delivery standards for lettuce, 7 CFR 46.44, as applicable to the warranty of suitable shipping condition, provide in relevant part as follows:

"Unless otherwise agreed to between the contracting parties 'Good Delivery' in connection with f.o.b. contracts of purchase and sale means that the commodity meets the requirements of the contract at time of loading or sale and, if the shipment is handled under normal transportation service and conditions, will meet the following additional requirements on delivery at the contract destination:

As proof of the alleged breach by complainant, respondent relies upon the results of the Federal inspection made of the 700 cartons of lettuce remaining in the car at Syracuse on May 18, 1970, showing, as to condition, an average of 37% damage, including 15% serious damage, by a "reddish-brown blotch type discoloration affecting various sections of the leaves." It is respondent's contention that this percentage of condition defects is sufficient to establish that the lettuce was abnormally deteriorated at contract destination in Syracuse.

It appears, from the evidence before us, that the shipment involved herein was handled under normal transportation service and conditions. Accordingly, we conclude that the warranty of suitable shipping condition is applicable in this case. On the basis of the results of the Federal inspection made on May 15, 1970, of the 500 cartons of lettuce located in the doorway and between the dividers of car PFE 475688, it is obvious that the deterioration in this lot was not abnormal and represented good delivery as to this portion of the load. However, it is equally obvious that the deterioration in the remaining 700 cartons located behind the two dividers in the car, as reflected in the Federal inspection of May 18, 1970, was abnormal so that these two lots failed to conform to the good delivery standards for lettuce, in violation of the warranty of suitable shipping condition. In reaching this conclusion, we are aware that the results of the May 18 inspection were obtained some four days after arrival of the car in Syracuse. However, and in view of the extensive deterioration noted in the second inspection, we believe that an earlier inspection of these two lots would have shown abnormal deterioration as well, particularly in view of the near-optimum temperatures prevailing in the car during the period May 15-May 18.

Complainant suggests, however, that the deterioration found in the lettuce at Syracuse was not due to any defect in the produce at shipping point, but was induced by the action on the lettuce of an overly-high concentration of carbon dioxide gas in this mechanically refrigerated car. Complainant argues that this was deterioration in transit, not caused by any fault of the shipper, which must be assumed by the receiver.

(a) Lettuce: (1) If the contract specifies a U.S. grade, the lettuce may contain an average of not more than 3 percent condition defects, including not more than 2 percent decay affecting any portion of the head exclusive of wrapper leaves in excess of the destination tolerance provided for the applicable grade in the U.S. Standards for Grades of Lettuce. (For example, the U.S. No. 1 grade provides a 12 percent tolerance for damage at destination. If a lot contains 5 percent damage by permanent grade factors, 7% of the tolerance can be applied to damage by condition factors. The additional 3% Good Delivery tolerance would then allow a total of 10% damage by condition factors in this shipment at destination.).

(2) * * *

In support of this viewpoint, complainant points to the results of the Federal-State inspection made of this lettuce at shipping point in Salinas on May 6, which resulted in the lettuce being certified as U.S. No. 1 grade at that time. In addition, complainant refers us to various publications and releases of the Department, wherein a defect of lettuce called "brown stain" was said to have apparently been caused by a relatively high concentration of carbon dioxide (10%) in the atmosphere.

It is not immediately apparent that the condition defect noted in this carload of lettuce was brown stain. While it was so identified by M. J. Ceponis, Research Plant Pathologist for the Department at Belle Mead, New Jersey, from samples submitted to him, Dr. Arden F. Sherf, Professor of Plant Pathology at Cornell University, Ithaca, New York, examined other samples from this load and diagnosed the defect as being Russet spot. But even assuming that the condition defect present in this load was "brown stain", a review of the literature released by the Department reveals that the cause of this disorder is not definitely known, and is attributed to excessive carbon dioxide in the atmosphere only as a theory having some support from laboratory test results. In this connection, it must be noted that there is nothing in the record before us to establish that there was an excessive level of carbon dioxide present in car PFE 475688 during transit. In fact, there is nothing to establish that this load, handled as it was under normal transportation service and conditions, would have had any higher or lower concentration of carbon dioxide in transit than any other shipment of lettuce under the conditions present here. Accordingly, we cannot find support for complainant's position in the record before us.

As already noted earlier in these conclusions, respondent's acceptance of the lettuce rendered it liable to complainant for the adjusted f.o.b. contract price of the lettuce, less any amount paid to respondent by complainant in connection with this transaction, and less provable damages suffered by respondent as the result of any breach of contract by complainant. The adjusted f.o.b. contract price of the lettuce is \$3,000, of which respondent has paid complainant \$2,350. As to the damages resulting from the breach of the warranty of suitable shipping condition by complainant (which breach has already been established), we find the broker placing respondent's loss at a figure in excess of \$1,300 (Report of investigation, Exhibit No. 5).

Respondent's claim for damages of only one half of this amount, or \$650, seems thus to be supported not only by the broker but by the scope of the deterioration noted in the inspection of May 18. Accordingly, we conclude that respondent was damaged at least in the amount claimed as reparation by complainant in this proceeding, or \$650, so that the complaint is thus offset and should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

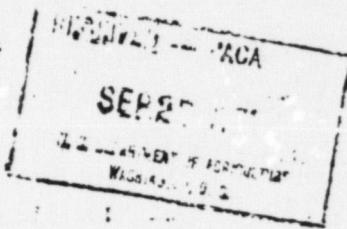
Done at Washington, D. C.

AUG 19 1971

THOMAS J. FLAVIN

Judicial Officer
Office of the Secretary

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE
P.A.C.A. DOCKET NO. 2-1977



SALINAS LIVESTOCK FARMERS COOPERATIVE,)
COMPLAINANT,)
VS.) PETITION FOR RECONSIDERATION
SALT CITY FARMERS CO., INC.,)
RESPONDENT.)

THIS PETITION FOR RECONSIDERATION IS MADE BY THE COMPLAINANT WHO BELIEVES THAT IT HAS BEEN AGRIEVED BY REASON OF THE DECISION AND ORDER DATED AUGUST 19, 1971. THE POINTS WHICH WE BELIEVE HAVE NOT BEEN FULLY RECOGNIZED AND CONSIDERED IN DETERMINATION OF THIS DISPUTE ARE AS FOLLOWS:

PAGE 5 PARAGRAPH 2 UNDER CONCLUSIONS, IT IS STATED THE CAR WAS HANDLED UNDER NORMAL TRANSPORTATION SERVICES AND CONDITIONS. THIS IS NOT A FACT SINCE THE PERISHABLE TARIFF CALLS FOR DELIVERY TO SYRACUSE FROM SALINAS, CALIFORNIA ON THE 7TH MORNING. IT WOULD THEREFORE APPEAR OBVIOUS THAT AN ARRIVAL AT 2:00 P.M. ON THE 8TH DAY FOR THE MARKET ON THE 9TH DAY WOULD CONSTITUTE A DELAY IN TRANSIT OF TWO DAYS THEREBY VOIDING THE GOOD DELIVERY STANDARDS. THE OFFICIAL GUIDE OF THE RAILROAD DATED APRIL 1, 1971, SPECIFICALLY SHOWS THE SCHEDULE TO CALL FOR 8TH MORNING DELIVERY TO BOSTON AT 5:00 A.M. IT IS THEREFORE OBVIOUS THAT A CAR DELIVERED TO CHICAGO ON THE 5TH MORNING IN ACCORDANCE WITH GUARANTEED SCHEDULES WOULD ARRIVE AT SYRACUSE, NEW YORK AT 6:00 A.M. ON THE 7TH MORNING. THE TARIFF FURTHER SHOWS THAT CARS WILL BE AVAILABLE ON TEAM TRACK 5:00 A.M. 3RD MORNING FROM CHICAGO INTO BOSTON AND ALL OTHER EASTERN TERMINALS ON THE 2ND MORNING.

THE STATEMENT THAT THE "NEAR-OPTIMUM" TEMPERATURES PREVAILED IN THE PERIOD OF MAY 15 TO MAY 18, 1970, CAN ONLY BE PURE CONJUNCTURE AS THERE IS ONLY EVIDENCE OF TEMPERATURES AT 8:40 A.M. MAY 15 AND AGAIN AT 10:00 A.M. MAY 18. NEITHER COMPLAINANT NOR RESPONDENT HAS ANY KNOWLEDGE AS TO THE TEMPERATURES OTHER THAN THOSE TWO HOURS AND DATES. COMPLAINANT DOES NOT KNOW HOW LONG THE LETTUCE WAS EXPOSED WITHOUT REFRIGERATION ON THE 14TH, 15TH, 16TH, 17TH, OR 18TH. WE DO KNOW BY RESPONDENT'S OWN ADMISSION THAT THE CAR DOORS

WERE OPEN ON MAY 14, 15 AND 16. GOVERNMENT INSPECTION ON MAY 15 AT 8:40 A.M., EXHIBIT NO. 3, PAGE 4 TO THE REPORT OF INVESTIGATION, SPECIFICALLY SHOWS THAT THE LETTUCE GRADED U.S.#1 ON MAY 15, TWO DAYS AFTER THE CAR WAS DUE FOR ARRIVAL AND INSPECTION ON MAY 18 AT 10:00 A.M. WOULD APPEAR TO BE SO VERY REMOTE IN TIME AS TO BE OF NO VALUE WHATSOEVER IN ESTABLISHING A BASIS FOR BREACH OF CONTRACT OR DAMAGES RESULTING THEREFROM.

PAGE 6 PARAGRAPH 2, AGAIN WE TAKE EXCEPTION TO THE JUDICIAL OFFICER'S STATEMENT THAT THE CAR WAS HANDLED UNDER NORMAL TRANSPORTATION SERVICES AND CONDITIONS FOR THE SAME REASONS SET FORTH IN THE ABOVE.

PAGE 6 PARAGRAPH 3 OF THE CONCLUSION EASES RESPONDENT'S ALLEGED DAMAGES ON A TOTALLY UNSUPPORTED AND UNVERIFIED STATEMENT OF THE BROKER, WHEREIN HE STATED, "THE CAR LOST OVER \$1,300.00." SEE EXHIBIT 3 PAGE 6 OF THE REPORT OF INVESTIGATION.

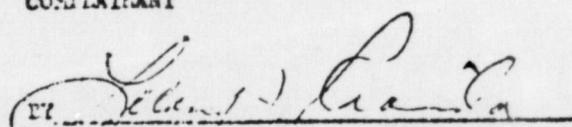
ON PAGE 7, AGAIN THE CONCLUSIONS, BASED ON THE TOTALLY UNSUPPORTED HEARSAY OF THE BROKER. WE CAN FIND NO MENTION AT ANY PLACE IN THE ENTIRE PROCEEDINGS WHEREIN THE RESPONDENT CLAIMS TO HAVE BEEN DAMAGED IN ANY AMOUNT OTHER THAN RESPONDENT'S LETTER OF AUGUST 14, 1970, EXHIBIT 3 PAGE 2 OF THE REPORT OF INVESTIGATION, WHEREIN HE STATES "IT WAS AT THE SUGGESTION OF THE BROKER THAT I WITHHELD THE \$650.00 WHEN REMITTING." ALL THIS WOULD ONLY LEAD A REASONABLE MAN TO ASSUME THAT THE BROKER ON HIS OWN VOLITION WAS ATTEMPTING TO ESTABLISH A BASE FOR DAMAGES WITHOUT ANY SUPPORTING EVIDENCE.

WE THEREFORE RESPECTFULLY SUGGEST THAT A DECISION BASED ON THE BROKER'S STATEMENT WITHOUT SUPPORTING EVIDENCE BY THE RESPONDENT WHO ALLEGEDLY LOST MONEY ON THIS TRANSACTION SHOULD NOT BE CONSIDERED AND THE DECISION IS IN ERROR IN THAT RESPECT.

WE THEREFORE RESPECTFULLY REQUEST THAT THIS ORDER BE RESCINDED IN LIGHT OF THE EVIDENCE RATHER THAN THE BROKER'S UNSUPPORTED STATEMENT AND AN ORDER BE ISSUED IN ACCORDANCE WITH LONG ESTABLISHED PRECEDENTS. SEE 23 AD 1128, CONN & SCALISE VS. A. J. PRODUCE CO.; 23 AD 282, MUTUAL VEGETABLE SALES VS. J. A. MORGAN PRODUCE, INC., WHEREIN IT IS STATED 24 HOURS DELAY voids THE GOOD DELIVERY STANDARDS IN LETTUCE; 24 AD 903; 24 AD 1553; 24 AD 388; AND 26 AD 928.

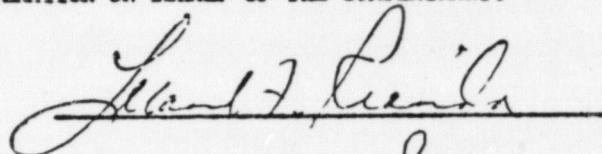
SALINAS LETTUCE FARMERS COOPERATIVE
COMPLAINANT

[21]

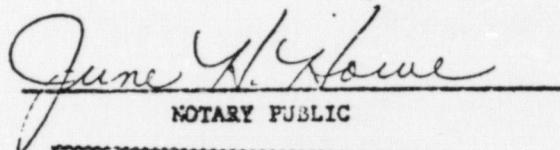

EDWARD F. RIVERA

EXECUTIVE VICE-PRESIDENT, GENERAL MANAGER

LELAND F. RIANDA, BEING FIRST DULY SWORN, SAYS THAT HE HAS READ THE FOREGOING PETITION FOR RECONSIDERATION AND KNOWS THE CONTENTS THEREOF AND THAT THE SAME IS TRUE, EXCEPT AS TO MATTERS THEREIN STATED ON INFORMATION AND BELIEF, AND AS TO SUCH MATTERS HE BELIEVES IT TO BE TRUE AND THAT HE IS DULY AUTHORIZED TO SIGN THE PETITION FOR RECONSIDERATION ON BEHALF OF THE COMPLAINANT.



SUBSCRIBED AND SWORN TO BEFORE ME THIS 23rd DAY OF September, 1971.


NOTARY PUBLIC

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Salinas Lettuce Farmers Cooperative, Complainant	}	PACA Docket No. 2-1977
v.		
Salt City Produce Co., Inc., Respondent	}	Order on Reconsideration

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 199a et seq.). On August 19, 1971, an order was issued dismissing the complaint, with a copy thereof being served upon complainant on August 23, 1971. On September 14, 1971, a stay order was issued, staying the order of August 19 until the issuance of a further order in the case, and giving complainant until September 27, 1971, within which to file a petition for reconsideration of the order of August 19, 1971.

Complainant filed its petition on September 27, 1971. In the petition complainant contends that our order of August 19, 1971, is in error in several respects, including our finding that the lettuce involved herein was handled under normal transportation service and conditions. Complainant states in its petition that there was a two-day delay in transit in connection with this shipment, so that the good delivery standards for lettuce, upon which we relied in our order of August 18, are inapplicable.

From our review of the record, it has not been established that this carload of lettuce was delayed in transit. While complainant in its petition cites us to the "official guide of the railroad dated April 1, 1971" as showing that this shipment did not adhere to the applicable schedules published therein, such citation is of little value since the "guide" was never offered in evidence. But even assuming that a two-day delay in transit had been established by complainant in connection with the movement of this load, we do not think that this would have been a material factor in the progression of the reddish-brown discoloration found in the lettuce at destination. In fact, complainant's own evidence, Exhibit No. 6-A to the formal complaint (this being a summary of the results of certain research done by the Department in connection with the problem of brown stain in lettuce) supports our view, noting that "Brown stain [does] not increase significantly during holding for 4 days at 50° F." Since the time the Department allocated to this test was double that involved in the alleged delay in transit, and since the test lot of lettuce was held at a temperature more than 10° F. above any recorded in the load involved in this case, we conclude that the best findings are sufficient to be decisive of this issue.

2-1977

raised in the petition.

Upon reconsideration of the order of August 19, 1971, we find that all the matters set forth in complainant's petition were thoroughly analyzed and considered at the time of the issuance of such order. In our opinion the order is supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition is dismissed without prior service upon respondent and the order of August 19, 1971, dismissing the complaint, is hereby reinstated.

Copies of this order shall be served upon the parties.

Done at Washington, D. C.

OCT 19 1971

THOMAS J. FLAVIN

Judicial Officer
Office of the Secretary

[NOTICE OF APPEAL]

TO: SALTCITY PRODUCE CO., INC.
2100 Park Street
Syracuse, New York 13208

PLEASE TAKE NOTICE that SALINAS LETTUCE FARMERS COOPERATIVE, a California corporation, hereby appeals to the United States District Court for the Northern District of New York from the reparation order in the above entitled matter originally issued by the Secretary of Agriculture of the United States on August 19, 1971, and recorded on October 19, 1971, in the proceedings instituted before the Secretary of Agriculture. A petition reciting the prior proceedings before the Secretary of Agriculture and stating the grounds upon which petitioner relies to reverse the order of the Secretary of Agriculture dismissing the complaint is attached hereto and made a part hereof.

Dated: New York, New York, November 17, 1971.

SALINAS LETTUCE FARMERS COOPERATIVE

by _____
Leland F. Rianda
Executive Vice-President
General Manager

[Petition of Plaintiff on Appeal]

Your petitioner, SALINAS LETTUCE FARMERS COOPERATIVE, respectfully represents to the Court that it was the complainant in a complaint filed before the Secretary of Agriculture of the United States in accordance with the provisions of the Perishable Agricultural Commodities Act of 1930 as amended (7 U.S.C. 499a, et seq.); that an answer to the complaint was filed, in substance denying liability as claimed in the complaint; that the proceedings were had upon the said complaint and answer before the Secretary of Agriculture, and the Secretary made certain findings in favor of the defendant and against the plaintiff, all of which appear more fully by the originals or copies which will be filed by the Secretary of Agriculture in accordance with the aforesaid Act.

The original findings of fact, conclusions and order were handed down on August 19, 1971, to which a petition for reconsideration was filed and which petition automatically stayed the said order of August 19, 1971.

The Secretary thereafter on October 19, 1971, dismissed the petition for reconsideration and reinstated

the order of August 19, 1971, dismissing the complaint of plaintiff against defendant.

Your petitioner believes and therefore avers that the findings of fact and the order made by the Secretary of Agriculture were in error and assigns the following reasons:

1. The findings of fact and order are contrary to the law.

2. The findings of fact and order are contrary to the facts submitted.

3. The Secretary improperly found that the warranty of suitable shipping condition was breached by plaintiff in that the lettuce shipped by plaintiff failed to conform to the good delivery standards for lettuce.

4. The Secretary improperly found that the shipment of lettuce was handled under normal transportation service and conditions.

5. The Secretary improperly found that the damages resulting from the breach of warranty of suitable shipping condition by plaintiff amounted to \$1,300.00.

The Conclusions drawn by the Secretary are erroneous in law and in fact.

WHEREFORE, the plaintiff requests that:

1. That the petition stand as its appeal from the order entered by the Secretary of Agriculture and that the plaintiff have a trial de novo of all causes and issues involved in this case.

2. The Clerk of thes Court immediately forward a copy of this petition to the Secretary of Agriculture requesting that the record be certified at once to this Court.

3. Upon a trial de novo of this cause, the appeal of the plaintiff be sustained and the findings and order of the Secretary be reversed.

Dated: New York, New York, November 17, 1971.

SALINAS LETTUCE FARMERS COOPERATIVE

by

Leland F. Rianda
Leland F. Rianda
Executive Vice-President
General Manager

[Summary Judgment Motion]

PLAINTIFF MOVES THE COURT AS FOLLOWS:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for the relief asked for and a trial is necessary, that the Court, at the hearing of the motion, by examining the pleadings, the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

- (a) Agreed Statement of Facts
- (b) Affidavit of GILBERT M. HERSCH, Esq., Attorney for the Plaintiff.

[STIPULATION]

STIPULATION to waive trial and for determination of Appeal upon an agreed Statement of Facts, made this 2nd day of May , 1974.

WHEREAS, plaintiff has appealed from a reparation order made by the Office of the Secretary of Agriculture on July 1, 1971, and from a further order denying its application for reconsideration, made October 19, 1971, and

WHEREAS, the parties have agreed that this matter be properly decided in this Court, without trial, under an agreed statement of facts,

IT IS STIPULATED AND AGREED by and between the parties and their respective attorneys that the following constitutes the facts upon which this Court is requested to decide this appeal and pass judgment:

I. All of the Findings of Facts made by the Judicial Officer of the Office of the Secretary of Agriculture in the order appealed from, dated July 1, 1971, are accepted by the parties, in full. For the convenience of this Court

the Findings of Fact are repeated and set forth in full, herein, as follows:

"FINDINGS OF FACT"

1. Complainant, Salinas Lettuce Farmers Cooperative, is a corporation whose address is P.O. Box 594, Salinas, California.

2. Respondent, Salt City Produce Co., is a corporation whose address is 2100 Park Street, Syracuse, New York. At the time of the transaction involved herein, respondent was licensed under the act.

3. On May 6, 1970, in the course of interstate commerce, complainant sold to respondent one carload, or 1200 cartons, of California Iceberg lettuce, 2-dozen size, "Downtown" brand, U.S. No. 1 grade, at an agreed price of \$3.57 per carton, f.o.b. shipping point, Salinas, California, plus 25¢ vacuum cooling charge. It was further agreed between the parties that respondent would be protected on this transaction against market decline at shipping point through May 8, 1970.

4. The contract set forth above was negotiated between the parties by a broker, J. F. McNulty, Inc., which issued a Standard Memorandum of Sale on May 6, 1970, setting forth the terms of said contract.

5. On May 6, 1970, complainant shipped 1200 cartons of lettuce, 2-dozen size, "Downtown" brand, from Salinas, California, to respondent at Syracuse, New York, in a mechanically refrigerated car, PFE 457688. A joint Federal-State inspection had been made of the lettuce in car PFE 457688 on May 6 in

Salinas, with the lot being certified as U. S. No. 1 grade, 89% hard and firm at that time.

6. Car PFE 457688 arrived at contract destination, Syracuse, New York, at 2 p.m. on Thursday, May 14, 1970. Respondent examined the lettuce in the car that afternoon and requested a Federal inspection. The Federal inspection, made at 9:40 a.m. the following day, May 15, yielded the following results in relevant part:

"Condition of equipment: Refrigeration motor running. An adjustable load divider in position approximately 7 feet from each side of door.

"Products inspected: LETTUCE . . . 'Downtown Brand' . . . Applicant's count - 1200 cartons.

"Condition of load: Through load. Between dividers 2 to 6 rows, 7 and 8 layers, lengthwise and crosswise loading.

"Temperature of product: At doorways: top 38°F., bottom 39°F.

"Quality: Clean, generally fairly well trimmed, head leaves good green color. Average 81% hard or firm, 17% fairly firm. Grade defects average 4%, including 2% soft, remainder poorly trimmed.

"Condition: . . . Wrapper leaves: No decay. Head leaves: Average 1% damage by brown discoloration if midribs. Average 1% decay.

"Grade: U.S. No. 1, 81% hard or firm.

"Remarks: This inspection and certificate is restricted to the upper 3 layer cartons between dividers."

7. On May 15, 1970, the broker prepared a "corrected invoice" addressed to respondent, reflecting a reduction in the f.o.b. contract price of \$1.25 per carton, in accordance with the protection agreement which was part of the contract of May 6. The total f.o.b. contract price, as adjusted, plus cooling charges, amounted to \$3,000.

8. At 10 a.m. on Monday, May 18, 1970, a second Federal inspection was made of the lettuce then remaining in car PFE 475688 at Syracuse. The results of that inspection, in relevant part, are as follows:

"Condition of equipment: Refrigeration motor running. Adjustable load dividers in position approximately 7 feet from each side of door.

"Products inspected: LETTUCE . . . 'Downtown Brand' . . . Applicant's count - 700 cartons (See remarks).

"Condition of load: Car partly unloaded. Cartons removed from between dividers. Behind dividers 2 to 6 rows, 7 to 8 layers, lengthwise and crosswise loading.

"Temperature of product: 1st stack behind divider: Top, 37°F. Bottom, 37°F.

"Quality: Clean, generally fairly well trimmed, head leaves good green color. Average 8½ hard

or firm, 17% fairly firm. Grade defects average 3%, including 2% soft, remainder poorly trimmed.

"Condition: . . . Wrapper leaves: No decay. Head leaves: Range from 5 to 14 heads per carton, average 37% damage and including 15% serious damage by a reddish-brown blotch type discoloration affecting various sections of leaves. Average 1% decay.

"Grade: Meets Quality Requirements but fails to grade U.S. No. 1, 81% hard or firm only account condition.

"Remarks: This inspection and certificate is restricted to the upper 4 layer cartons remaining in car behind load dividers."

9. Respondent complained to the broker and to complainant, respectively, in telegrams sent to each on May 20, 1970, as follows:

To the broker:

"PLEASE BE ADVISED THAT I INTEND TO HOLD YOU AND YOUR ORGANIZATION RESPONSIBLE FOR ANY LOSS INCURRED DUE TO YOUR FAILURE TO HANDLE PROMPTLY AND PROPERLY WITH THE SHIPPER PFE 475688."

To complainant:

"HOLDING YOU AND BROKER RESPONSIBLE FOR ANY LOSS INCURRED PFE 475688."

10. The total f.o.b. price of the lettuce involved herein, as adjusted, is \$3,000, of which respondent has paid complainant \$2,350.

11. The formal complaint was filed on November 16, 1970, which was within 9 months after the alleged cause of action herein accrued."

II. Car No. PFE 457688 arrived in Syracuse on Thursday afternoon, May 14, 1970, at 2:00 P.M.

III. Normal transportation time from Salinas, California, to Syracuse, New York, is "seventh morning delivery". "Seventh morning delivery" means in time for the market of the seventh morning after departure from Salinas, California. The Syracuse, New York, market opens for sales at 6:00 A.M.

IV. The subject car was opened by the defendant on Thursday afternoon, after arrival, and the contents were visually inspected by Dominick Schiano, president of the defendant corporation, at such time.

V. On Thursday afternoon, May 14, 1970, defendant removed 100 cartons of the lettuce from the railroad car to his store, about 100 yards away, for the purpose of making sales, and facilitating a United States Department of Agriculture inspection.

VI. Defendant first had the lettuce inspected by the United States Department of Agriculture, in the railroad car, on Friday, May 15, 1970, at 8:40 A.M., prior to which time 100 cartons of lettuce had been removed from the car.

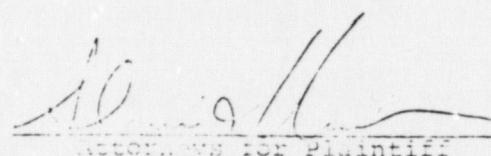
VII. Defendant again had the lettuce inspected by the United States Department of Agriculture, in the railroad car, on May 18, 1970, at 10:00 A.M., by which time 500 cartons of lettuce had been removed for sale. This was not an appeal inspection; nor was an appeal inspection ever ordered.

* VIII. The unloading of Car No. PFE 457688 was completed on May 20, 1970, at 3:00 P.M., at which time the car was released to the railroad. During the intervening time, defendant had been pulling lettuce from the car, as needed for sales. During all of such time, defendant did not take the temperature of the railroad car.

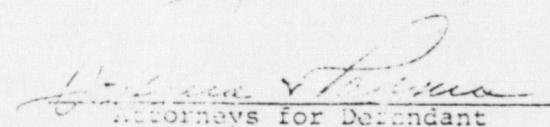
IX. Defendant has no way of determining the market price of lettuce in Syracuse, New York, on May 14, 1970, on May 15, 1970.

IT IS FURTHER STIPULATED AND AGREED that all of the exhibits annexed to the complaint, and to the answer, filed by the parties before the United States Department of Agriculture shall be deemed to be admitted in evidence in this action.

IT IS FURTHER STIPULATED AND AGREED that the parties waive formal trial of this action and consent that this Court shall determine this appeal, and enter judgment, upon all of the facts and exhibits hereinabove set forth.



Attorneys for Plaintiff



Attorneys for Defendant

[ORDER]

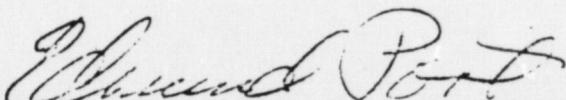
ORDER

The plaintiff having moved for summary judgment herein,
upon all of the proceedings had, it is

ORDERED, that the plaintiff's motion for summary judgment
be and the same hereby is denied; and it is further

ORDERED, that the findings of fact of the Secretary of
Agriculture and the stipulation of facts by the parties be
and they hereby are adopted as the findings of fact of this
court; and it is further

ORDERED, that judgment be entered herein in favor of the
defendants, affirming the decision and order of the Secretary
of Agriculture, and the said decision of the Secretary of
Agriculture be and the same hereby is affirmed.


Edmund Post
United States District Judge

Dated: December 26, 1974
Auburn, New York

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 71-CV-525

SALINAS LETTUCE FARMERS COOPERATIVE,
Plaintiff

vs.

SALT CITY PRODUCE CO., INC.,
Defendant

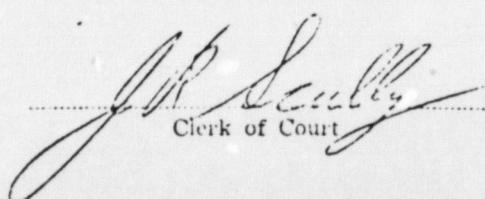
JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Edmund Port
United States District Judge, presiding, and the issues having been duly
(heard) and a decision having been duly rendered.

It is Ordered and Adjudged

judgment enter in favor of defendants, affirming decision
and order of the Secretary of Agriculture, and said
decision is affirmed.

Dated at Utica, New York , this 27th day
of December 1974 .


Clerk of Court

NOTICE OF APPEAL

TO

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

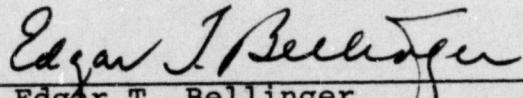
NOTICE is hereby given that SALINAS LETTUCE FARMERS COOPERATIVE, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order and judgment denying the plaintiff's motion for summary judgment, and directing judgment to be entered in favor of the defendant affirming the decision and order of the Secretary of Agriculture entered December 27, 1974.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SALINAS LETTUCE FARMERS COOPERATIVE, :
Appellant, :
v. : Docket No. 75-7160
SALT CITY PRODUCE CO., INC., :
Appellee. :

CERTIFICATE OF SERVICE

I, Edgar T. Bellinger, hereby certify that I mailed, postage prepaid, a copy of the Joint Appendix and Brief for Appellant to Thomas F. Pasqua, Esquire, 1010 Hill Building, Syracuse, New York 13202, attorney for appellee Salt City Produce Co., Inc., this 18th day of June, 1975.



Edgar T. Bellinger

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(298-8600)

Attorneys for Appellant
Salinas Lettuce Farmers Cooperative

